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No. 82-2157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

v.

CENTRAL TRANSPORT, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF AND BRIEF AS AMICUS CURIAE

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the

petition for Writ of Certiorari. Petitioners have consented to the filing of this brief; respondents have not.

INTEREST OF THE NCCMP

Multiemployer plans are created and funded pursuant to collective bargaining agreements and such plans receive contributions from more than one employer. The NCCMP is a nonprofit, tax-exempt organization formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA")[1] to participate in the development of employee benefit legislation and government regulations under ERISA and other laws affecting multiemployer plans. More than 140 multiemployer plans and related international unions (but not the particular unions or plans involved in this case) are affiliated with the NCCMP. These plans are fairly representative of all the nation's multiemployer plans, covering more than eight million workers. The decision below has far-reaching consequences for all multiemployer plans and, therefore, is particularly adverse for the NCCMP affiliates, which represent the vast majority of participants in such plans, for the reasons set forth in the accompanying brief.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to provide the Court with insight concerning the practical implications of the decision below for multiemployer plans and to state the position of the trustees, participants, and beneficiaries of such plans. In

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[1] ERISA was substantially amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 94 P.L. 96-364, 94 Stat. 1208 (1980).

fact, the NCCMP has recently participated as an *amicus curiae* in both *McNeff v. Todd*, ____ U.S. ____, 51 U.S.L.W. 4497 (1983) and *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72 (1982).

The NCCMP urges this Court to issue a Writ of Certiorari in the instant case. The NCCMP's concern is that refusal of this Court to review the judgment below—that trustees can no longer independently ascertain the identity of their plan participants, but must delegate this fiduciary duty to adversely interested parties over whom the trustees have no control—will have broad, adverse consequences upon the financial soundness of its affiliated employee benefit plans and, therefore, upon the plans' ability to provide benefits.

FACTS AND QUESTIONS OF LAW DEVELOPED BY THE NCCMP

The NCCMP brief focuses on issues which it believes may not be adequately presented elsewhere, including:

(a) the particularly adverse impact that the court's holding below will have on national employee benefit policy and the multitude of multiemployer plans represented by the NCCMP; and

(b) the fundamental conflict between decisions of this Court, as well as those in other federal circuits, and the decision of the court below.

The NCCMP, therefore, moves for leave to file the accompanying brief as *amicus curiae.*

Respectfully submitted,

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief as *amicus curiae* to urge this Court to review the holding below that multiemployer plan trustees may not conduct an audit of pertinent payroll records

of all employees of a participating employer in order to determine whether the employer is fulfilling its legal obligation to make contributions on behalf of, and in the proper amount for, participants in a multiemployer plan.

I. INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. As set forth in this brief, the NCCMP submits that the decision below offends the national employee benefits policy established by Congress and recognized by this Court and, therefore, will have a significant adverse effect upon the nation's multiemployer plans and the retirement security of more than eight million participants and beneficiaries.

The NCCMP is concerned that the refusal of this Court to review the lower court's decision may undermine both the independence and neutrality of multiemployer plan trustees and the financial integrity of such plans. Trustees would no longer be able to determine on an ongoing basis whether employer contributions were being made on behalf of covered employees. Only after an employee applied for benefits or requested an accounting of trust assets would the trustees be able to determine whether the employee was an eligible participant to whom such financial disclosure must be made and whether contributions should have been made on his/her behalf. Trustee failure to make an accurate accounting of plan assets, including contributions due, to plan participants and to the federal government subjects the trustees to statutory sanctions. Trustee failure to attempt to collect contributions constitutes a prohibited transaction, actionable under ERISA. The lower court's ruling, by emasculating the authority of trustees, threatens the very foundation of multiemployer plans – their financial base.

II. THE NATURE OF MULTIEMPLOYER PLANS

The multiemployer plan involved in this proceeding and the typical plan affiliated with the NCCMP have many characteristics in common. They are established and maintained pursuant to the collective bargaining process, and they cover workers in broad geographical areas. These plans, too, are subject to legal constraints in three respects important to the issues raised by the lower court's ruling:

(i) all employees covered by the relevant provisions of the applicable collective bargaining agreements are also covered by the plan, subject only to the limits of the plan's eligibility requirements;

(ii) contributing employers must make payments on behalf of all their covered employees; and

(iii) benefits from pension plans must be paid by the plan to covered employees whether or not the requisite employer contributions have been made to the plan.

These legal obligations serve to assure that the maximum number of eligible employees receive from a properly funded plan the benefits for which they labored.

A financially sound plan, and one operating within the confines of law, requires a proper actuarial relationship between employer contributions and employee benefits. The necessary predicate to maintaining the legally mandated financial integrity of pension plans is the implementation of an ongoing system to monitor plan assets – including plan contributions – and plan liabilities, *i.e.*, identifying how much and to whom benefits will be paid.

Employer desires to minimize expenses, including payments to employee plans, are in constant tension with plan needs to maximize the collection of contributions. Therefore, it is the typical practice of trustees of plans, like those in this proceeding and those affiliated with the NCCMP, to establish strict

auditing procedures which ensure employer compliance with both plan and statutory reporting and contribution provisions. It has been the experience of the NCCMP affiliates that two discrete types of monitoring procedures are generally conducted: delinquency audits and systematic audits.[1] Delinquency audits are the result of known or suspected failures or refusals of employers to properly report or contribute. On the other hand, systematic audits are conducted because trustees have garnered extensive experience in administering plans and know that occasional spot-checking of employers' records is the only reasonable method of ensuring that what is essentially an honor system of employer self-reporting in fact remains honest.

It cannot be said that a procedure for systematic audits is created out of overabundant caution or needless worry. Manifest and reasonable cause for trustees to systematically audit employers is amply demonstrated by the countless litigated cases in which employers have sought to deny or evade their obligations to contribute on behalf of any or all of their employees. Moreover, this legion of cases in part stimulated the deep Congressional concern that resulted in the passage of the Multiemployer Pension Plan Amendments Act of 1980, P.L. 96-364, 94 Stat. 1208 (1980), wherein the Congress expressed its intent to simplify and expedite the collection of unpaid contributions by multiemployer plan trustees. *See*, 29 U.S.C. § 1145; *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 92-99 (Brennan, J., dissenting) (1980). The instant case is quite simply a frustration of that Congressional intent.

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[1] The court below refers to systematic audits as "random audits." However, the process of selecting the target for such an audit is not "random" in the statistical sense. Rather, once the determination is made to conduct systematic audits, the selection process is the result of a considered decision by plan trustees to audit, for example, employers in one segment of an industry, or employers in a particular location, or employers over a certain size.

III. SUMMARY OF REASONS FOR REVIEW

1. Consistent with established Congressional policy, this Court has declared that employee benefit plan trustees have an absolute duty of loyalty to plan beneficiaries and the exclusive authority to control plan administration. *See, NLRB v. Amax Coal,* 453 U.S. 322, 329-333 (1981). To fulfill these responsibilities, this Court has consistently recognized the right of those trustees to calculate and collect employer contributions due the employee benefit funds. *See, McNeff v. Todd,* ____ U.S. ____, 51 U.S.L.W. 4497 (1983); *NLRB v. Amax Coal, supra; Lewis v. Benedict Coal Corp.,* 361 U.S 459 (1960); *United States v. Carter,* 353 U.S. 210 (1957). The independent right of trustees to ascertain the identity of trust participants and beneficiaries is a fundamental prerequisite to the discharge of all fiduciary duties found at common law; all such duties which are detailed in the Employee Retirement Income Security Act ("ERISA"); and those fiduciary duties which have been interpreted by the federal judiciary. *Accord, McNeff v. Todd,* ____ U.S. ____, *supra; Chicago M. & St. P.R. Co. v. Des Moines U.R. Co.,* 254 U.S. 196, 208 (1920); 2 *Scott on Trusts,* §§ 170, 171 (3d ed. 1967). Yet, contrary to these fundamental principles, the Court below denied the trustees the independent right to conduct an audit of the pertinent records of all the employer's employees in order to verify on whose behalf and in what amount an employer must contribute.

Additionally, the funding of employee benefit plans, like the federal income tax structure, is based on a system of self-reporting. Systematic audits are the keystone of financial integrity in both instances. Therefore, in order to satisfy their fiduciary duties, trustees must continue to attempt to conduct such audits, because they are the most effective and reasonable means of protecting the interests of the millions of workers who will look to these trusts for benefits. Hence, the limitations on trustees imposed by the court below create a recurring problem for those who administer multiemployer plans.

2. The lower court, straining logic and ignoring economic reality, delegated to the employer the trustees' duty of identifying actual and potential trust beneficiaries by limiting the scope of the trustees' audit only to those employees whom the employer asserted were entitled to the benefits of the plan. This delegation of trustee authority is contrary to the reasoning of this Court in *NLRB v. Amax Coal, supra*, and *McNeff v. Todd, supra;* it is contrary to the express dictates of ERISA, *see*, 29 U.S.C. §§ 1103, 1104, 1106, 1110; and it stands in direct conflict with decisions in the federal circuits, including the Sixth, interpreting the duties of trustees. *See, Rosen v. Hotel & Restaurant Emp., Etc.*, 637 F.2d 592, 600 (3d Cir. 1981); *Nichols v. Trustees of Asbestos Workers Pension Plan*, 3 EBC 1726 (D.D.C. 1982); *Nedd v. United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977); *Van Gunten v. Central States, Etc.*, 672 F.2d 586 (6th Cir. 1982).

Absent a uniform rule enunciated by this Court, trustees will be whipsawed between the denigration of their authority by the court below and the ultimate responsibilities imposed on them in all the circuits, including the Sixth. *See, Van Gunten v. Central States, Etc., supra.*[2]

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[2]Ironically, the Sixth Circuit recently held in *Van Gunten v. Central States, Etc., supra*, that the pension plan, which is the subject of the instant case, must pay benefits to a participant even though an employer had failed to make the requisite contributions on behalf of that participant. This case is discussed, *infra*, at 15.

IV. REASONS FOR REVIEW

1. Multiemployer plan trustees must have an independent right to ascertain the identity of trust beneficiaries by means of systematic audits.

A.

This Court long ago held that in order to create a trust there must be reasonable certainty as to the purpose, the property, and the beneficiaries. *Chicago M. & St. P.R. Co. v. Des Moines U.R. Co.*, 254 U.S. 196, 208 (1920). The purpose of multiemployer benefits trusts and the policy underlying the statute which regulates those trusts are one and the same: to protect the interests of participants and to ensure the receipt of promised benefits. *See*, 29 U.S.C. §§ 186(c)(5), 1001(b).

The property of such employee benefit trust consists initially of employer contributions, which employers have a statutory obligation to pay. 26 U.S.C. § 412 and 29 U.S.C. §§ 1082, 1145. Moreover, ERISA "vests the 'exclusive authority and discretion to manage and control the assets of the plan' in the trustees alone, and not the employer or the union. 29 U.S.C. § 1103(a)." *NLRB v. Amax Coal*, 453 U.S. 322, 333 (1981). The beneficiaries of these trusts are employees who satisfy plan eligibility requirements.

B.

With respect to multiemployer pension plans there is no question but that trustees make the initial determination of whether an employee is a beneficiary at that point in time when the employee retires and applies for a pension. Furthermore, the fact that an employer has wrongfully failed to make contributions on behalf of an employee-beneficiary has been held not to form the basis for trustee refusal to pay the benefit, because the entitlement and amount of the pension is a function of hours worked, not hours worked for which contributions were paid. *See, Van Gunten v. Central States, Etc., supra.* Therefore, the

trustees, upon whom Congress has imposed a fiduciary duty to maintan the financial integrity of the trust, must have an ongoing mechanism to determine on which employees' behalf and in what amounts employers must make contributions. *See, NLRB v. Amax Coal, supra,* 453 U.S. at 336-337; *Adams v. N.J. Brewery Emp. Pen. Trust Fund, Etc.*, 670 F.2d 387, 397 (3d Cir. 1982); *Rosen v. Hotel and Restaurant Emp. Etc., supra*, 637 F.2d at 600. Anything less than a comprehensive system for monitoring, recording and crediting contributions with accuracy would not be what "a prudent man acting in a like capacity and familiar with such matters" would do. 29 U.S.C. § 1104(a)(1)(B). *See, Nedd v. United Mine Workers of America, supra; Nichols v. Trustees of Asbestos Workers Pension Plan, supra.*

Nonetheless, the court below denied the trustees the right to conduct a systematic audit of pertinent records of all the employer's employees in order to ascertain whether the employer was properly reporting and contributing on behalf of all eligible employees. The court left the trustees at the mercy of employers by holding that an employer was entitled to limit the scope of the audit to the pertinent records of employees, who the employer – and only the employer – asserted were covered by the plan. Thus, the more egregious the employer's failure to report to the trust on behalf of eligible employees, the more limited the scope of the audit.

The danger of such a situation is illustrated in the case of *McNeff v. Todd, supra*, where this Court found an employer obligated to contribute on behalf of employees pursuant to a valid prehire agreement, and where the employer had consistently reported that it had no covered employees. It was precisely because of a plan audit that the trustees were able to verify that certain employees were in fact participants in the trust on whose behalf contributions were legally required. Yet, under the holding in the instant case, the trustees in *McNeff v. Todd* could not have conducted such an audit, because the employer asserted that none of its workers were covered

employees. Therefore, although this Court has held that employers must contribute and trustees must collect those contributions, the decision below blindfolds the trustees in the performance of their legal duty.

C.

The court below failed to appreciate that the funding of multiemployer plans, like the federal income tax structure, is based on a system of self-reporting and that "it would be naive to ignore the reality that some persons attempt to outwit the system. . . ." *United States v. Bisceglia*, 420 U.S. 141, 145 (1975). Just as the tax investigatory system of audits prevents the dishonest and erring from escaping taxation and shifting heavier burdens to honest taxpayers, so, too, does a pension fund's audit program prevent employers from avoiding their contribution obligation, thereby diluting the financial stability of the trust and shifting the burden to complying employers. Monitoring compliance by systematic audits in both situations has long been found to be reasonable, prudent, and the most effective tool for monitoring fiscal integrity. *Accord, United States v. Bisceglia, supra; Donaldson v. U.S,* 400 U.S. 517 (1971)

D.

The court below held out to the trustees the possibility of broadening the scope of the audit to include the records of particular employees who the trustees have reasonable cause to believe should have been reported by the employer. Though characterized as a "reasonable cause" requirement, the detail and particularity which the court below required of the trustees in reality subjects them to the same kind of "probable cause" standard that this Court has rejected in analogous situations — rejected because the requirement would compel litigation on the very subject of the inquiry. *See, United States v. Powell,* 379 U.S. 48, 54 (1964) (upholding the scope of an Internal Revenue Service investigation); *United States v. Morton Salt Co.,* 338

U.S. 632, 642-643 (1950) (recognizing the broad scope of inquiry by the Federal Trade Commission); *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 216 (1946) (enforcing the subpoena power under the Fair Labor Standards Act).

The court below erroneously held that this "reasonable cause" standard must be imposed on the trustees because the scope of investigations by the Secretary of Labor into suspected or known violations of ERISA are expressly subject to such a standard. *See*, 29 U.S.C. § 1134(a). The court read more into the statutory language than in fact is there. The Secretary can

> . . . make an investigation, and in connection therewith to require the submission of reports, books and records, and the filing of data in support of any information required to be filed with the Secretary under this title. . .

29 U.S.C. § 1134(a)(1), without any express requirement of reasonable cause.[3] Moreover, the Secretary may make an on-site review of such records, without any express requirement of reasonable cause, if that entry is made pursuant to an agreement. 29 U.S.C. § 1134(a)(2). The Secretary must satisfy an express reasonable cause standard only if on-site review is requested by the Secretary, but not agreed to by the subject of the review. 29 U.S.C. § 1134(a)(2). In the instant case there is no doubt that the employer agreed to an on-site audit by the trustees. Therefore, if the lower court's analogy to the role of the Secretary is properly drawn, the trustees do not need reasonable cause, because they have an agreement to conduct an on-site audit. Reasonable cause defines the limits of the entry into the workplace, not the scope of the audit. Even if the statute were not absolutely clear, the lower court's reading of the provision is inconsistent with this Court's interpretation of similar investigatory provisions. *Accord, Marshall v. Barlow's, Inc.*, 429 U.S. 1347 (1977).

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[3]Recently, the Sixth Circuit broadly interpreted the scope of information subject to this statutory provision. *See, United States v. S & Vee Cartage Co., Inc.*, ____ F.2d ____, 4 EBC 1361, 1364 (6th Cir. 1983).

E.

ERISA imposes on fund trustees the obligation to comply with detailed minimum standards governing participation, funding, vesting, reporting, and disclosure. Concomitantly, the statute establishes corresponding stringent penalties for failing to satisfy those obligations. The court below, by intruding upon the day-to-day administration of trusts and limiting the independent authority of those involved in that administration, exposes trustees to the imposition of substantial civil and criminal penalties for failure to discharge their duties. *See,* 18 U.S.C. § 1027, 29 U.S.C. § 1132. Chief among those duties is that of unwavering and absolute loyalty to fund participants, *NLRB v. Amax Coal, supra;* yet the court below has denied the trustees the independent means to verify to whom that loyalty is owed.

This Court long ago held and ERISA now states that to assure that the trustee has exercised prudence in the collection and management of trust assets, beneficiaries must be given a complete accounting by the trustee. *Dillman v. Hastings,* 144 U.S. 136 (1892); 29 U.S.C. §§ 1024, 1025. Additionally, the trustee must annually provide the federal government with highly detailed financial information concerning the assets and liabilities of the trust and the number of participants, 29 U.S.C. §§ 1024, 1307. Clearly, no accurate reporting and disclosure can be made if the trustees cannot independently identify the beneficiaries – the necessary predicate to determining the trust's liability for accrued pension benefits – and the trust assets, which include the appropriate employer contributions.

F.

The court below simply misunderstood the purpose of a systematic audit: to inquire whether the employer's reporting is accurate, not to accuse the employer of inaccuracies. "It would seem elementary that no meaningful investigation . . . could be conducted if the identity of the persons involved must first be ascertained," *United States v. Bisceglia, supra,* 420 U.S. at 150, but so the court below held.

For years, trustees have relied upon audits as the most expeditious and reasonable means to verify the accuracy of their trust accounts. The legislative history of ERISA indicates that Congress refrained from delineating an exclusive and discrete list of powers and duties of fiduciaries. Hence, Congress did not dictate to the trustees the type of mechanism necessary to assure accurate accounting of employer contributions. Rather Congress intended that fiduciary conduct be governed by principles applicable to the common law of trusts, *see,* 3 *United States Code and Administrative News*, 1974, at 4639, 5186, thereby sanctioning trustees' use of audits – a traditional means of protecting and preserving trust assets. Moreover, Congress, desirous of the continued maintenance and financial integrity of multiemployer plans, recently enacted legislation to protect those plans and place further duties upon their trustees to collect employer contributions. Multiemployer Pension Plan Amendments Act of 1980, P. L. 96-364, 94 Stat. 1208 (1980). This Court has recognized and adhered to that Congressional intent. *See, McNeff v. Todd, supra; Robinson v. UMW*, 455 U.S. 562 (1982); *NLRB v. Amax Coal, supra.* However, the holding below runs afoul of that Congressional purpose and subverts the reasoning of this Court.

The Congress went to great lengths to make clear its reasons for recently amending ERISA.

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case . . . Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

* * *

> The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provisions be made to discourage and simplify delinquency collection.

126 *Cong. Rec.* H7899 (daily ed. August 26, 1980). *See, Amax Coal, supra*, 453 U.S. at 338, n. 22.

The necessary predicate to any such delinquency action must be an audit. In fact, as discussed above, it is all but impossible for trustees to satisfy their obligations under the statute with respect to collection of contributions if the trustees are not given a free hand to determine whether employers are making proper contributions. The decision by the lower court has left the trustees collection role to the whimsy of employers. Essentially, the greater the employers' failure to report covered employees, the more restricted is the trustees' ability to monitor those failures.

Congress has mandated that collection actions not be mired in the judicial process; it follows, *a fortiori*, that the necessary prerequisite to the trustees' determining whether such an action should be brought – a complete audit of the pertinent records of all employees – must not itself become the subject of endless litigation.

2. The statutory mandate that trustees remain neutral and act for the exclusive benefit of trust beneficiaries would be materially compromised if trustees were required to delegate the determination of employee eligibility to adversely interested parties over whom the trustees have no control.

A.

Trustees and their benefit funds are to be independent of employer and union control. *NLRB v. Amax Coal, supra; Bugher v. Consolidated X-Ray*, 705 F.2d 1426 (5th Cir. 1983). Moreover, ERISA was designed to reinforce, not to reduce that

independence, by generally prohibiting trustees from delegating their fiduciary responsibilities. *See*, 29 U.S.C. §§ 1105, 1110. As discussed above, the underpinnings of all fiduciary duties is the loyalty the trustees owe to the trust beneficiaries. The trustees' ultimate concern is the relationship between the beneficiaries and the fund. *NLRB v. Amax Coal, supra*, 453 U.S. at 337-338.

Multiemployer plans, like the one in the instant case, often extend coverage over wide geographical areas. Multiemployer plan participants do not choose their employer on the basis of the federal judicial circuit in which that employer does business. The duties and obligations of the trustees of these plans must, therefore, be uniform throughout the circuits. This need for consistency is also reflected in the express Congressional directive that the United States courts fashion a federal common law of pensions to fill the statutory interstices extant in ERISA. *See, Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, ____ U.S. ____, 51 U.S.L.W. 4945, 4951, (1983); *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 663 (9th Cir. 1981); *Wayne Chemical Inc. v. Columbus Agency Service Corp.*, 426 F. Supp. 316, 322 (N.D. Ind.) *aff'd as modified*, 567 F.2d 692 (7th Cir. 1977).

B.

The holding below – which essentially delegates the trustees' duty to verify the identity of plan participants to the employer, the union, the employees themselves, or the Department of Labor – is inconsistent with decisions in the Sixth and other federal circuits, clearly erroneous under ERISA, and patently absurd. The dilemma forced upon trustees by the inconsistency of the holding below is illustrated by comparing that decision to three other recent decisions. In *Rosen v. Hotel and Restaurant Emp., Etc., supra*, the court held that the trustees had an affirmative duty to notify a participant if contributions were not being made on his/her behalf; a duty to take action against the employer for failure or refusal to contribute; and an obligation

to pay benefits to an eligible employee, even if his/her employer had failed to make the appropriate contributions. The court recognized that although the union owes a duty of fair representation to its members, "it does not control, nor is it in a position to oversee, the employer's contributions to the Fund. *United States v. Santiago,* 528 F.2d 1130, 1133 (2d Cir. 1976), *cert. denied,* 425 U.S. 972 (1976)." *Id.,* 637 F.2d at 599, n. 10. *See, Robbins v. Prosser's Moving & Storage Co.,* 700 F.2d 433 (8th Cir. *en banc* 1983). The *Rosen* decision stands in stark contrast to the delegation of trustee authority mandated in the decision below.

Consistent with the decision in *Rosen*, the Sixth Circuit held last year in *Van Gunten v. Central States, supra,* that trustees could not deny pension benefits to an employee because the employer had failed to make contributions. In addition to the obligation to pay benefits for which an employee labored, Congress imposed upon trustees a fiduciary duty to maintain the financial integrity of employee benefit trusts. However, the decision below, when read in conjunction with the *Rosen* and *Van Gunten* decisions, gives the trustees no independent mechanism to monitor the payment of monies into the trust, while at the same time requiring them to make payments out of the trust.

Moreover, in *Nichols v. Trustees of Asbestos Workers Pension Plan,* 3 EBC 1726 (D.D.C. 1982), the court held that not only were fiduciary duties nondelegable, but also that it is clearly the nondelegable duty of trustees to determine what is owed the plan. That court relied on, *inter alia,* the Third Circuit's decision in *Rosen:*

> [I]t is the duty of the Trustees to determine what is owed to the Plan in . . . contributions for the years in question, to attempt to collect this sum, and to create a system by which future . . . contributions may be monitored, recorded and credited with accuracy. Anything less would not be what 'a prudent man acting in a like capacity and familiar with such matters'

> would do. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). How the Trustees fulfill this duty is left to the discretion of the Trustees themselves; the Court, in its limited role in the administration of pension trusts, may only order them to do so. *See, e.g., Johnson v. Botica*, 537 F.2d 930, 937-38 (7th Cir. 1976); *Pete v. United Mine Workers*, 517 F.2d 1275, 1286 (D.C. Cir. 1975).

Nichols v. Trustees of Asbestos Workers Pension Plan, supra, 3 EBC at 1732.

If the ruling of the court below is permitted to stand, trustees administering plans that span these federal circuits will have no choice but to risk breaching a fiduciary duty in one jurisdiction due to a diminution of their authority in another. Moreover, to the extent that the applicable federal agencies determine that the failure to collect employer contributions has jeopardized the financial integrity of a fund, trustees can be certain that these agencies will take action against them even in the face of the fact that the court below has made it virtually impossible for trustees to audit an employer and thereby find delinquent contributions owing to the fund. *See*, 29 U.S.C. § 1134.

C.

Although the lower court held that the trustees could rely on the Department of Labor to ascertain the identity of participants, reality belies such reliance. The Department of Labor *Pension and Welfare Benefit Programs Compliance Manual* lists and describes thirteen types of investigatory programs to be undertaken by the Department in fulfillment of its statutory obligations under ERISA. *See, Compliance Manual*, Chapter 9, §§ 204.012 – 204.0213. None of these programs deal with delinquent contributions or audits of employers to discover underreporting or nonreporting of covered employees.

This silence is telling and consistent with the express Congressional decision to deny the Department of Labor the right to initiate an action for delinquent contributions. 29 U.S.C.

§ 1132(b)(2). Moreover, at the same time that it denied this right to the Department of Labor, the Congress recognized that "Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously." Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Summary and Analysis of Consideration of S. 1076, Multiemployer Pension Plan Amendments Act of 1980 (Comm. Print 1980) (unnumbered document) at 44. To accomplish this goal, Congress amended ERISA to provide that when trustees successfully sued to collect unpaid employer contributions, courts must award to the plans not only the amount of the contribution, but also interest on the contribution, liquidated damages, costs of the action, and reasonable attorney's fees. 29 U.S.C. § 1132(g)(2).

D.

The court below also held that the trustees could delegate to the employees themselves the duty of determining whether they are plan participants. Such delegation turns all trust law on its head by imposing the duty of the trustee on the beneficiary. Regarding the participants' ability to recognize and assert their own rights under plans, suffice it to say that ERISA's disclosure requirements are a direct response to testimony by one worker after another that he/she had been unaware of the provisions and rules of the applicable employee benefit plan. *See*, 120 *Cong. Rec.* 29934 (1974) (remarks by Sen. Williams).

The trustees, employer, and union are not only three distinct entities, but each has its own separate and often adverse interests in the determination of who is a covered employee. The interest of the union and the employer arise from their obligations to see that the collective bargaining agreement, to which they are parties, is administered in accordance with its terms and the relevant provisions of federal and state law. Moreover, the employer has obligations to keep accurate records and make the proper contributions, duties it owes to the union, the federal government, and the plan. Nonetheless, there is a recognized constant tension between these employer obligations and the

reality of the employer's business relationship with the plan. That relationship is adversarial, for the plan is a creditor of the employer; the employer's business interest is to minimize the claims of all creditors, including the plan's claim for contributions.

The trustees have a broader interest and more comprehensive obligations than either the employer or the union. The trustees clearly have a duty to determine in the first instance who is eligible to receive benefits. This inquiry cannot be left to the point in time when an individual applies for benefits. The trustees have an ongoing interest in knowing exactly who are the plan participants, *i.e.*, identifying the potential beneficiaries of their trust. Absent a vehicle for determining who the trust participants are, the trustees have no way to ascertain for whom contributions must be made. These contributions, both once they are paid and while they are yet accounts receivable of the trust, are part of the trust *res*. *See*, 29 U.S.C. §§1082(b)(2), 1145.

Precluding the trustees from making a threshhold analysis to identify the plan participants by means of an audit denies the trustees access to the basic information, essential to fulfilling their common law and statutory fiduciary duties. Moreover, because the trustees have an overriding duty of loyalty to trust beneficiaries, the breach of which is subject to statutory sanctions, the trustees must be in a position to determine to whom they owe their allegiance.

Thus, the responsibility for the proper administration of the trust that the trustees owe to the federal government and all plan participants is more comprehensive than any duties owed by either the union or the employer. The court below has severely undermined the powers of the trustees to satisfy their independent responsibilities and has engendered a serious uncertainty as to how those responsibilities can be met.

V. CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges this Court to issue a Writ of Certiorari.

Respectfully submitted,

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